

that a judge exercising that power had to exercise it according to law — that is, within the range prescribed in Order 42 rule 12.

Finally, I tested the reasoning of Mr. Liu's argument against other paragraphs in section 80(2) of the Act. One such paragraph was paragraph (1):

"(1) regulating the modes in which a writ of seizure and sale may be executed, and the manner in which seizure may be made of *any property* seizable thereunder, ...

(the emphasis is mine).

It is clear from the Interpretation Act that "property" in its unqualified form, must mean both movable and immovable property, an interpretation placed beyond a doubt by the use of the word "any" in paragraph (1). Examining the Rules, it is also clear that writs of seizure and sale have been restricted only to movable property, which I see is really an exercise of discretion by the Rules Committee within the limit prescribed under paragraph (1), and it does not now leave it open to a execution creditor to argue that he can issue a writ of seizure and sale against immovable property.

All considered, I rejected the arguments of learned counsel and ordered that interest on the judgment debt be at the rate of 8% pursuant to Order 42 rule 12 of the Rules.

Order accordingly.

Solicitors: *Lim, Ganesh & Liu.*

A MALAYSIAN REPORTS

CITIBANK N.A. v. OOI BOON LEONG & ORS.

[F.C. (Raja Azlan Shah C.J. (Malaya), Chang Min Tat & Salleh Abas F.JJ.) May 21 & July 2, 1980]

[Kuala Lumpur — Federal Court Civil Appeal No. 21 of 1979]

B *Contract — Contract of guarantee — Variation without surety's consent — Alteration unsubstantial and to the benefit of sureties — Waiver of rights by sureties — Contracts Act, 1950, s. 86.*

Banking — Advances given to company — Guarantee by directors of company — Alteration in terms of contract — Alterations unsubstantial and to the benefit of sureties — Waiver of rights by sureties.

C *Practice and Procedure — Action on contract of guarantee — Certificate of indebtedness conclusive — Summary Judgment — R.S.C. 1957, O. 14.*

Evidence — Written contract — Factual background to contract — Evidence Act, 1950, ss. 91 & 92.

In this case the appellant bank sued the respondents on a contract of guarantee for banking accommodation given to a company. The respondents were the directors of the company and in the contract of guarantee they had agreed in effect to waive their rights in respect of any variation or alteration of the contract between the appellant bank and the company. The advances were not repaid and the appellant bank sued the respondents. The appellant bank then applied for summary judgment under Order 14 of the Rules of the Supreme Court. The Assistant Registrar made an order in terms but this order was reversed in the High Court. The respondents had contended that their liabilities under the guarantee were conditional on the bank securing certain acts on the part of the company, the directors and the shareholders. Such acts were not contained in the guarantee but were contained in a letter which set out the terms and conditions of the loan. The respondents relied on the fact that the bank had not obtained (a) a valid debenture on the company's assets containing a provision to enable receivers to be appointed in the event of default; (b) a letter of undertaking from the shareholders who held 40% of the issued share capital not to divest their shareholdings without the bank's consent.

F **Held:** (1) the letter from the bank containing the terms and conditions of the loan did not fall within the category of negotiations so as to be caught by the prohibitory provisions of the Evidence Act but gave factual background which was admissible;

G (2) the variations, if any, in this case were so fleeting and patently non-prejudicial to the respondents as to fall into the *de minimis non curat lex* rule. In this case the bank had obtained an order for the sale of the assets of the company under the debenture and there was no evidence that any of the shareholders had in fact transferred their shares;

H (3) in any event the contract of guarantee in this case contained express provisions giving the bank the right to do or omit to do certain things without thereby prejudicing the right against the respondents. As the respondents had agreed to waive any variation or alteration and the bank had proceeded with the performance of the contract on that basis it would be inequitable to allow them to rescind from the contract;

(4) in this case the respondents were bound under the contract of guarantee to accept the certificate of indebtedness duly executed by the Vice-President of the bank as conclusive evidence of the debt due to the bank. On this footing the bank was entitled to summary judgment.

Cases referred to:-

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- (1) *Prenn v. Simmonds* [1971] 3 All E.R. 237, 241.
 - (2) *Holme v. Brunskill* (1878) 3 Q.B.D. 495, 505.
 - (3) *National Bank of Nigeria Ltd. v. Awolesi* [1964] 1 W.L.R. 1311, 1316.
 - (4) *Rees v. Berrington* (1795) 30 E.R. 765, 767.
 - (5) *Polak v. Everett* (1876) 1 Q.B.D. 669, 677.
 - (6) *Dobbs v. National Bank of Australasia Ltd.* (1935) 53 C.L.R. 643.
 - (7) *Bache & Co. v. Banque Vernes* [1973] 2 L.L.R. 437.

FEDERAL COURT.

C. Abraham for the appellants.

V.C. George (*K.S. Narayanan* with him) for the respondents.

Cur. Adv. Vult.

Raja Azlan Shah C.J. (Malaya) (delivering the judgment of the Court): The appellant bank ("the bank") in this case sued the respondents for the sum of \$331,731.32 inclusive of interest upon a contract of guarantee up to a limit of \$600,000 for banking accommodation given to Leisure Industries Sdn. Bhd. The respondents are directors of the company. Whether they are the only directors has not been made clear. They jointly and severally guaranteed in written form the repayment of such advances made to the company and interest thereon at an agreed rate.

The writ was issued on December 13, 1977. On January 21, 1978 the bank took out an R.S.C. Order 14 application, supported by a proper affidavit, for summary judgment. The Assistant Registrar made an order in terms but his order was reversed in the High Court. The appellant now appeals to this court to restore the order of the Assistant Registrar.

The clauses relevant to the consideration by the court in hearing R.S.C. Order 14 application are the following:

"Clause 8. The liability of any of us hereunder shall not be affected by any failure by the Bank to take any security or by any invalidity of any security taken or by any existing or future agreement by the Bank as to the application of any advances made or to be made to the customer.

Clause 16. No one of us shall be discharged or released from this guarantee by any arrangement made after this guarantee or any dealing between the customer and the Bank without our knowledge or consent or by any variation or alteration without our knowledge or consent in the agreement between the customer and the Bank for the making of advances or otherwise giving credit or affording banking facilities to the customer by the Bank.

In other words to give full effect to the provisions of this guarantee each of us hereby waives all rights inconsistent with such provisions and which we might otherwise as sureties be entitled to claim and enforce and we declare that the Bank shall be at liberty to act as though we or each of us were principal debtors or principal debtor to the Bank for all payments guaranteed by us as aforesaid to the Bank."

These clauses expressly maintain the liability of the respondents in the event of the bank doing or omitting to do certain acts therein recited.

The respondents contend that their liabilities under the guarantee were conditional on the bank securing certain acts on the part of the company, the directors and the shareholders. Such acts are not contained in the guarantee but are present in a long letter bearing the same date as the guarantee and containing the terms and conditions under which the bank was prepared to grant the loan facilities to the company. The acceptance by the respondents of the offer was expressly made conditional upon a formal document of guarantee "incorporating substantially" the said terms.

It has nowhere been contended that there are other documents and inferentially the guarantee sued

on was the legal document containing the terms between the parties and it was executed by the respondents after acceptance by them. It must therefore be a matter for argument whether the said letter is admissible in evidence to determine the existence and the application of the terms of the guarantee having regard to the provisions of sections 91 and 92 of the Evidence Act 1950. We are of the view that the said letter does not fall within the category of negotiations as to be caught by the prohibitory provisions of the Evidence Act but gives factual background which is certainly admissible. As Lord Wilberforce said in *Prenn v. Simmonds*⁽¹⁾:

"In my opinion, then evidence of negotiations... ought not to be received, and evidence should be restricted to evidence of the factual background known to the parties at or before the date of the contract, including evidence of the 'genesis' and objectively the 'aim' of the transaction."

Relying entirely on the contents of this letter, the respondents raised two objections to the application. They argued that the failure of the bank to obtain (i) a valid debenture on the company's assets in that it did not contain any provision to enable the receivers to be appointed in the event of default to sell the properties of the company charged under it, and (ii) A letter of undertaking from the shareholders who held about 40% of the issued share capital not to divest their respective shareholdings without the bank's prior written consent and to inject additional capital into the company in the event of a cash shortfall as long as the term loan was outstanding constituted variations of their contractual liability and were sufficient to absolve them from their obligations. The Assistant Registrar thought such arguments irrelevant. The High Court considered that they raised issues which entitled the respondents to unconditional leave to defend.

It is necessary to consider the statutory provisions of section 86 of the Contracts Act 1950 which was relied on by the respondents. The section is as follows:

"Any variance, made without the surety's consent, in the terms of the contract between the principal debtor and the creditor, discharges the surety as to transactions subsequent to the variance."

The section provides express provision for the respondents to consent to any variation. They are the sole judges whether or not they will consent to remain liable notwithstanding such variation, and that if they have not so consented they will be discharged. This provision is in accordance with what is stated to be the law by Cotton L.J. in *Holme v. Brunskill*⁽²⁾ which was followed in the Privy Council in *National Bank of Nigeria Limited v. Awolesi*⁽³⁾:

"The true rule in my opinion is, that if there is any agreement between the principals with reference to the contract guaranteed, the surety ought to be consulted, and that if he has not consented to the alteration, although in cases where it is without inquiry evident that the alteration is unsubstantial, or that it cannot be otherwise than beneficial to the surety, the surety may not be discharged; yet that if it is not self-evident that the alteration is unsubstantial, or one which cannot be prejudicial to the surety, the court, will not, in an action against the surety, go into an inquiry as to the effect of the alteration... but will hold that in such a case the surety himself must be the sole judge whether or not he will consent to remain liable notwithstanding the alteration, and that if he has not so consented he will be discharged."

This passage follows the classic statement of Lord Loughborough L.C. in *Rees v. Berrington*⁽⁴⁾: "It is the clearest and most evident equity not to carry on any transaction without the knowledge of (the surety), who must necessarily have a concern in every transaction with the principal debtor. You cannot keep him bound and transact his affairs (for they are as much his as your own) without consulting him."

We think the matter is tersely summed up by Quain J. in the case of *Polak v. Everett*⁽⁵⁾: "I think the convenience and policy of the matter ... is that the contract of the surety should not be altered without his consent."

In the light of what was said in *Holme's case*, *supra*, "where it is without inquiry evident that the alteration is unsubstantial, or that it cannot be otherwise than beneficial to the surety" we are of the opinion that the variation, if any, was so fleeting and patently non-prejudicial to the respondents as to fall within the *de minimis non curat lex* rule — the law does not concern itself with trifles. Whatever the validity of the first objection i.e. that the debenture was said to be defective in that it did not contain any provision to enable the receivers to be appointed in the event of default to sell the properties of the companies charged under it, the bank in an *inter partes* application had obtained an order from the High Court to sell the assets of the company under the debenture. The offer was made on March 21, 1978 and until it is set aside on appeal, it is an effective order for the sale and could not, by any stretch of the imagination or by any sensible argument, be said to result to the detriment of the respondents, it not being contended that there were other assets which had escaped the net of the debenture. But the respondents have put forward the suggestion that the company may appeal against the decision authorising the sale. The short answer to that is of course that the appeal must be lodged in accordance with well-defined rules of court within a specified time. This court is not advised that such an appeal has been brought.

With regard to the second objection that the bank had failed to obtain an undertaking from the other shareholders holding about 40 per cent of the issued share capital of the company not to divest their shareholdings without the bank's prior written consent, there has not been a shred of evidence or even of allegation that such shareholders had in fact transferred their shares. In any event, this contention completely ignores the ordinary provision in the articles of association of a private limited company such as this one is that the transfer of any shares by any shareholder could only be effected with the approval of the board of directors — a provision necessary for the smooth operation of a private limited company as a small body of men — and the fact therefore that the first line of defence to make the shareholders retain their shares and thus to preserve, as if it could, the financial security of the respondents, was the respondents themselves. Neither is it anywhere alleged that the shares were other than fully paid up shares to show that there is any possibility of a call-up on the unpaid portion of the shares.

A In any event, the contract of guarantee contains express provisions giving the bank the right to do or omit to do certain things without thereby prejudicing its right against the respondents. Clause 8 provides that the bank may recover from the respondents notwithstanding any failure on its part to take any security or that any security given to the bank is invalid. Clause 16 enables the bank at its absolute discretion and without notice to or consent of the respondents to vary or alter the contract between the bank and the company and that any right of the respondents which is inconsistent with the terms of the contract has been waived by them. In other words there was a voluntary waiver of the rights of the respondents to be subrogated on payment of the loan. C Accordingly where the respondents have promised to waive any variation or alteration and the bank has proceeded with the performance of the contract on that basis it would be in our opinion inequitable to allow them to resile from the contract.

D That brings us to the important question whether the Assistant Registrar was entitled to deal with the case under the R.S.C. Order 14 procedure. We have often said in this court many a time that where all the issues are clear and the matter of substance can be decided once and for all without going to trial there is no reason why the Assistant Registrar or the judge in chambers, or, for that matter this court, shall not deal with the whole matter under the R.S.C. Order 14 procedure. In the present case the guarantee contains a clause which enables the bank by producing a certificate of indebtedness by its officer to dispense with legal proof of the actual indebtedness of the respondents. Clause 19 provides thus "A certificate by an officer of the bank as to the money and liabilities for the time being due or incurred to the bank from or by the customer shall be conclusive evidence in any legal proceedings against us or any one of us or our personal representatives." It means that, for the purpose of fixing liability of the respondents, the company's indebtedness may be ascertained conclusively by a certificate: see *Dobbs v. National Bank of Australasia Ltd.*⁽⁶⁾ *Bache & Co. v. Banque Vernes*.⁽⁷⁾ F G

H In the circumstances the respondents are bound under clause 19 to accept the certificate of indebtedness duly executed by the Assistant Vice-President of the Branch as conclusive evidence of the debt due to the bank. On this footing the bank would be entitled to judgment as prayed for.

This appeal is allowed with costs here and in the High Court below.

Appeal allowed.

I Solicitors: *Shearn Delamore & Co.; Ng Ek Teong & Partners.*